Similarly, a federal district court struck down the so-called "family viewing policy" adopted in the mid-1970s, rejecting the claim that it was merely "voluntary" self-regulation. The FCC had initiated a series of meetings with network, independent TV, and National Association of Broadcasters (NAB) officials "to serve as a catalyst for the achievement of meaningful self-regulatory reform."[10] The FCC's message was amplified in speeches by its chairman to broadcast groups and in suggestions to the press that public hearings would be convened if voluntary action was not forthcoming.[11] The FCC's "suggestions" were adopted by the networks and were to be enforced through an industry code. The self-regulation program was adopted just in time for the FCC to report to Congress on the status of televised sex and violence. In striking down the policy, the U.S. District Court for the Central District of California found that "[t]he existence of threats, and the attempted securing of commitments coupled with the promise to publicize noncompliance . . . constituted per se violations of the First Amendment."[12] The court characterized the FCC's tactics as "backroom bludgeoning,"[13] and although the District Court opinion was vacated on appeal on jurisdictional grounds, the Court of Appeals agreed that "the use of these techniques by the FCC presents serious issues involving the Constitution, the Communications Act and the Administrative Procedure Act."[14]

In short, these examples demonstrate what self-regulation is not. Efforts to promote official government policies through the use of threats, indirect pressure, or policy guidelines masquerading as industry "codes" are not self-regulation. For purposes of this analysis, the question remains whether the public interest will be served without the use of such pressure tactics.

DEREGULATION AND THE PUBLIC INTEREST

In the absence of regulation, will broadcasters provide public interest programming? At the outset it is important to note that this question contains two embedded assumptions—first, that the "public interest" concept is sufficiently defined to be understandable, and second, that regulation leads to the creation of more such programming, whatever it may be. The D.C. Circuit recently ques-

tioned the first assumption in the Equal Employment Opportunities context, noting that the FCC "never defines exactly what it means by 'diverse programming'" (a traditional public interest shibboleth), and described the government's formulation of the interest as "too abstract to be meaningful."[15] Despite the ambiguity inherent in this concept, however, it is possible to examine the overall question in light of recent market and regulatory experience.

Inexplicably, most analyses of public interest programming focus solely on broadcast television, to the exclusion of other video sources. For example, the FCC's analysis of educational television in its proceeding on children's television expressly excluded programming on cable television systems and other subscription video services, such as direct-broadcast satellite systems.[16] It did so despite the fact that the Supreme Court had a few weeks before the *Children's Television Order* accepted the FCC's argument that "[c]able television broadcasting . . . is as 'accessible to children' as over-the-air broadcasting, if not more so," and that most people receive television via cable, which provides entire networks dedicated to education.[17] In addition, the FCC's Order did not mention VCRs, for which there is an abundant supply of educational programs, and which, by the Commission's own surveys, are present in 88 percent of American households. By some estimates, VCRs are present in 95 percent of homes with children.[18]

By broadening the assessment of "public interest" programming to include television as it exists in most American homes, the answer to the question of whether broadcasters will choose to provide public interest programming in the absence of regulation comes out quite differently than in most FCC studies. Put another way, to the extent the government asserts that cable television is "pervasive" when it seeks to regulate program content, it should not be able to deny that fact when seeking to assess what programs are available on TV. In this regard, Professor Eli Noam of Columbia University, in a recent study encompassing both broadcast and multichannel television sources, found that public interest programming on commercial television has been growing at a rapid rate.[19] He defined such programs as those that "go beyond pure entertainment and provide a cultural, civic, informational, or educational function."[20]

Noam identified a significant number of cable television networks that provide what he considered to be public interest programming, including A&E Television, Bravo, C-SPAN, CNBC, CNN, Court TV, Discovery, Disney, The Fox News Channel, The History Channel, The Learning Channel, Mind Extension University, The Weather Channel, and others, including regional news channels. He also identified several channels, such as Black Entertainment Television, that address the interests of ethnic minorities. In total, the number of channels found to provide "primarily public interest programming" was considered to be quite large, representing almost half of the available cable channels considered in the study.[21] Noam also attempted to quantify the growth rate of "public interest" programming availability, and found that the annual growth rates for various programming categories were "extraordinarily high," including 12.86 percent for news programs, 13 percent for documentary and magazine programs, 12.4 percent for health/medical programs, 12.7 percent for programs on science and nature, 8.8 percent for cultural programs, 7.62 percent for high-quality children's programming, 9.41 percent for programs devoted to education, 8.8 percent for religious programming, and 9.48 percent for foreign-language programming.[22] Overall, he found that the share of public interest programming hours compared to total program hours grew from 28.2 percent to 43 percent between 1969 and 1997.[23]

The market for public interest programming is not limited to cable television. Noam also found that the news coverage of traditional local broadcasters "has expanded considerably in terms of hours," and that serious news magazine programs have proliferated on the broadcast networks.[24] A study by A. H. Belo Corp., which owns seventeen full service television stations, found that the amount of time devoted by the four major broadcast network affiliates to news, public affairs, and educational programming in its seventeen markets ranged from 20 to 34 percent of the total broadcast schedule.[25] In addition to traditional news programming, the NAB estimated that television stations devote approximately $6.85 billion to community service annually, including $4.6 billion in time for public service announcements, $2.1 billion raised for charitable causes, and $1.48 million in air time devoted to political debates, candidate forums, and convention coverage.[26]

Whatever the extent of such public service, it is far from clear that FCC programming mandates that require broadcasters to transmit a specified number of hours of "quality" programming will outperform the market in providing such fare. When in 1996 the FCC adopted a "guideline" that broadcasters should air three hours per week of educational programming, the record before the Commission was quite ambiguous about whether the rule would lead to an increase in the level of such programming. An academic researcher who completed surveys of forty-eight randomly selected television stations in 1992 and 1994 and submitted them to the FCC found that commercial stations reported airing on average 3.4 hours per week of regularly scheduled, standard-length educational programming (although the researcher deemed some of the claims of educational value for the shows "frivolous").[27] A survey by the NAB in 1994 of 559 stations found that the average station aired almost four and one-third hours per week of educational and informational programming. Another survey by the Association of Local Television Stations, polling seventy-eight local independent stations, found that the average station aired 3.77 hours per week of educational programming in the first quarter of 1995.[28]

Although the FCC described the various surveys as "inconclusive,"[29] it nevertheless adopted a rule that appeared to require—on average—less educational programming than broadcasters were already providing. The FCC could have adopted a number other than three hours for its programming guideline, of course, but this assumes that a rule that requires educational programming necessarily produces education. More importantly, it does not compare the results of bureaucratically driven demand with the demands of the consuming public for such programming. In this regard, it is all the more curious that the FCC overlooked the emergence of a market for educational programming on media that are not covered by the children's television rules.

It also is worth noting that political coverage by television stations generally has expanded when FCC rules governing such programs have been relaxed or repealed. The presidential debates were televised in 1960 only after the "equal opportunities" provisions of the Communications Act of 1934 were suspended.[30] Over

the years, televised debates became a fixture of political campaigns because the FCC expanded the news programming exemptions to the equal opportunities rule.[31] More ambitious experiments with free candidate time were made possible during the 1996 election cycle because the FCC relaxed those rules, too.[32] The Supreme Court recently acknowledged the intrusive nature of political broadcasting regulation (whether by government rule or constitutional litigation) in *Arkansas Educational Television Commission v. Forbes,* when it noted that the threat of a third-party access requirement had caused the cancellation of a political debate.[33]

Another way to address this question is to examine the post-fairness doctrine experience. In 1975, fully 90 percent of radio stations in the United States were devoted to music formats. However, beginning in 1988 (the first year after the fairness doctrine was repealed), the number of stations in the informational programming category (including news, news/talk, talk, and public affairs formats) "rose meteorically."[34] Between 1987 and 1995 the number of AM radio stations devoted to informational programming more than quadrupled (from about 7 percent to almost 30 percent of all stations), and the number of information-format FM stations more than tripled (from about 2 percent to approximately 7.4 percent).[35]

MARKET "FAILURE" AND THE SEARCH FOR "QUALITY" PROGRAMMING

Despite the growth of news and informational formats in the absence of regulation, this trend has been criticized as leading to the proliferation of shallow or excessively partisan political talk shows. In this view, increased discussion of political issues on such media as talk radio may not adequately promote deliberative democracy or serve the public interest if it leads to political decisions based on "misleading or sensationalistic presentations of issues."[36] Thus, specifically referring to talk radio, former FCC chairman Reed Hundt urged broadcast licensees to "emphasiz[e] accuracy and truth over a quest for ratings and advertising dollars" and added "we need solutions to public disinformation and mis-

information."[37] Among other things, Hundt suggested extending greater protections from litigation for broadcast journalists, while finding ways to ensure "fair" coverage and means "to assure the public that the news on TV will be impartial and that opinions on TV will be balanced."[38] But as former FCC commissioner James H. Quello asked in response, "In the eyes of what beholder?"[39]

The question of whether or not an unregulated marketplace produces "enough" valuable speech, or conversely, "too much" worthless or harmful speech assumes an ability to determine the optimal amount separate from the voluntary choices of speakers and listeners.[40] It presumes that the "public interest" should outweigh traditional First Amendment concepts of speaker and listener autonomy. Otherwise, as Thomas Krattenmaker and Lucas A. Powe framed the issue, "viewers will watch or read what critics and regulators like with insufficient frequency and will enjoy too often what commissioners and columnists abhor."[41]

Others, such as Cass Sunstein, would prefer to replace "consumer sovereignty" with the wise selection by regulators of such programming as "high-quality fare for children" and "public affairs programming."[42] Such a selection may "depart[] with consumer satisfaction," according to Sunstein, but it would not really deny "choice."[43] It would merely allow "democratic choices to make inroads on consumption choices."[44] Such "democratic choices," in this view, would lead individuals to make wiser consumption choices. "If better options are put more regularly in view," Sunstein has written, "at least some people would be educated as a result" and "might be more favorably disposed toward programming dealing with public issues in a serious way."[45]

To assert that bureaucratically determined programming decisions do not deny "choice" is pure sophistry. All program selection involves "choice" by definition. The central question is whether the choice should be made individually (e.g., "consumer sovereignty") or collectively, by elected officials or appointed regulators. Traditional First Amendment doctrine considers it a "fixed star in our constitutional constellation" that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[46] The First Amendment "presupposes that right conclusions are more likely to be gathered

out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[47] No matter how well-intentioned the proposals to improve the quality of television may be, to the extent that they conflict with the choices of speakers and viewers, they are inconsistent with a concept of freedom in which "no one has a right to press even 'good' ideas on an unwilling recipient."[48] Freedom of speech and of the press "may not be submitted to vote: they depend on the outcome of no elections."[49]

Theorists in this debate generally seek to avoid a head-on collision with such basic constitutional doctrine by framing the choice as if it were between democracy and consumerism.[50] Thus, "democratic judgments" are placed in opposition to "consumption choices."[51] Former FCC chairman Mark Fowler's unfortunate metaphor for television—a "toaster with pictures"—is frequently invoked, seemingly making the choice a simple one: If the First Amendment (along with the public interest standard of the *Communications Act*) was designed to promote the Madisonian value of deliberative democracy, should not proper constitutional analysis require an official preference for political speech over consumer culture?[52] Or, as Owen Fiss has asserted, "we may sometimes find it necessary to 'restrict the speech of some elements of our society in order to enhance the relative voice of others,' and . . . unless the Court allows, and sometimes even requires, the state to do so, we as a people will never truly be free."[53]

This conception of the value of speech, however, treats the marketplace of ideas metaphor far too literally and sets up a simplistic dichotomy between consumers and voters.[54] Certainly the "marketplace" includes commercial speech, popular culture, and entertainment, but it also includes the market for politics, news, education, high culture, and information.[55] Alexander Meiklejohn wrote that political speech extends far beyond town hall debates to include literary and artistic expression.[56] For that reason, the First Amendment forbids government from deciding what material citizens "shall read and see" or "distinguish[ing] between 'good' novels and 'bad' ones."[57] For that matter, the First Amendment also bars the government from choosing policy papers from Washington think tanks for the reading pleasure of its citizens

over trashy novels no matter how much such a selection may foster Madisonian values.[58] Such choices can never be "delegated to any of the subordinate branches of government."[59] The essential choice, then, is between "individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."[60]

The assumption of some theorists is that democratic values and institutions will be strengthened if public interest regulation ensures that the public pays more attention of political debates and discussions, but that Madisonian goals would be betrayed in a world of limitless media choices because "consumption choices . . . disserve democratic ideals" where "people [can] screen out ideas, facts, or accounts of facts that they find disturbing."[61] This assumes that truly democratic goals are promoted by encouraging (or forcing) people to pay attention to this season's political contest for a given office or to the issues of a current referendum. (But see *A Clockwork Orange.*)

PUBLIC BROADCASTING AND THE PUBLIC INTEREST

The creation and funding of the public broadcasting system is the most direct way for the government to promote its vision of the public interest. It also is the least restrictive way. Unlike regulatory solutions, such subsidies promote democratic dialogue without infringing other constitutional values (unless the government seeks to use control over funding to benefit or burden particular speakers). Krattenmaker and Powe, among others, have noted that "to the extent the marketplace is perceived as impoverished, subsidies may be an effective way of correcting its inadequacies" so long as they are "true subsidies" rather than "extractions from media competitors."[62]

The challenge to public broadcasting is to find a reliable source for the subsidies it needs without having its editorial decisions compromised by political control. This is no small feat, but it is not substantively different from other regulatory questions. Those who argue that congress and the FCC should regulate commercial broadcasters because public broadcasting lacks adequate support fail to acknowledge that either approach requires the expenditure

of political capital. It is beyond the scope of this paper to suggest a source of funding to support public broadcasting (e.g., through spectrum fees paid by commercial broadcasters, some other type of regulatory fee, or general revenues), but in the end, such decisions are little different from the decision to regulate. If Congress could muster the political will to pass a law requiring commercial broadcasters to provide free time for political candidates, and the FCC could adopt workable implementing rules, then the legislature similarly could adopt a means to provide permanent adequate funding for public broadcasting.

The more difficult issue involves avoiding political control over editorial decisions once funding has been provided. Public broadcasting historically has been a political battleground. Conservatives have charged that public broadcasting is biased toward the left; liberals have argued that it is influenced by corporate underwriting and pressure from conservative politicians.[63] Patrick Buchanan, then an advisor to President Richard Nixon, classified liberal commentators on PBS variously as "definitely anti-administration," "definitely not pro-administration," and "unbalanced against us," and conservative commentators as "a fig leaf."[64] Similarly, Clay T. Whitehead, the first director of the White House Office of Telecommunications Policy, told PBS officials that news commentary, "particularly from the Eastern intellectual establishment," would invite political attention.[65] Accordingly, in February 1972, Whitehead informed Congress that the Nixon administration opposed any permanent financing for the Corporation for Public Broadcasting unless local public stations were given greater power to control programming.[66] The administration had concluded that PBS should not be allowed to develop into a fourth network producing public affairs programming because of its belief that such programming would be hostile to administration policies.[67] Such an approach to government subsidies of speech, and resulting implementing policies, has resulted in litigation over the extent to which the one who pays the piper may call the tune.[68]

Experience with speech subsidies highlights the risk inherent in more direct forms of regulation. If government cannot be trusted to fund supplemental programs without succumbing to the

impulse to censor, it is even more threatening to notions of free speech to permit direct regulation of content. Government may have an important role to play in bringing informational, educational, and participatory opportunities to those least able to participate in democratic institutions. But if it cannot adhere to constitutional boundaries when it performs this role, there is little reason to believe it will show greater restraint if given more regulatory power.

CONCLUSION

"Self-regulation" is not a policy option that needs to be "implemented." Properly understood, self-regulation is the absence of government regulation, and the only "implementation" that is required is for the government to stop regulating the content of broadcast speech. When it has done so in the past, public interest programming has been provided to a willing audience. To whatever extent policymakers believe that the amount of public interest programming is deficient, however, the public broadcasting system can play an important role in providing additional meritorious programming.

Endnotes

1. Under this section, program ratings would be devised "on the basis of recommendations from an advisory committee established by the Commission," which would be composed of "parents, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector." The FCC would provide staff and resources for the advisory committee.

2. 47 U.S.C., sec. 303(w).

3. Letter from Senator John McCain to Robert Wright, President and CEO of the National Broadcasting Company, 29 Sept. 1997.

4. Paul Farhi, "TV Ratings Agreement Reached," *The Washington Post,* 10 July 1997, A1.

5. See Implementation of sec. 551 of the *Telecommunications Act of 1996,* Video Program Ratings, FCC 98–35 (released 13 March 1998); Implementation of Sections 551(c), (d), and (e) of the *Telecommunications Act of 1996,* Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings FCC 98–36 (released 13 March 1998).

6. Garry Abrams, "Censor Chip?" *California Law Business,* 18 Mar. 1996, 20, 21.

7. See generally, Robert Corn-Revere, "Television Violence and the Limits of Voluntarism," *Yale Journal on Regulation* 12 (Winter 1995): 187.

8. *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (en banc).

9. *Anti-Defamation League of B'nai B'rith, South Pacific Southwest Regional Office v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1967), cert. denied, 394 U.S. 30 (1969).

10. *Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C. 2d 418, 420 (1975).

11. *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, 1098, 1105, 1117 (C.D. Cal. 1976), vacated and remanded on jurisdictional grounds sub nom. *Writers Guild of America, West v. ABC*, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).

12. *Writers Guild of America, West v. FCC*, 1151.

13. *Writers Guild of America, West v. FCC*, 1142.

14. *Writers Guild of America, West v. ABC, Inc.*, 609 F.2d at 365.

15. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998). The court noted that "[a]ny real content-based definition of the term may well give rise to enormous tensions with the First Amendment."

16. *Policy and Rules Concerning Children's Television Programming*, 11 FCC Rcd. 10661, 10677, 10681 (1996) *("Children's Television Order")*.

17. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S.Ct. 2374, 2386 (1996).

18. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd. 1034, para. 103 (1998). See Ken Robinson, *Telecommunications Policy Review*, 8 Sept. 1996, 3.

19. Eli Noam, "Public Interest Programming by American Commercial Television," 39 (paper presented at the Future of Public TV conference, New York City, 6 March 1998). The study examined the growth of public interest programming available on cable television systems in New York City between 1969 and 1997. See "Role of Commercial TV in Public Interest Programming Hotly Debated," *Communications Daily*, 9 March 1998.

20. Noam, "Public Interest Programming," 1.

21. Noam, "Public Interest Programming," 44.

22. Noam, "Public Interest Programming," 41.

23. Noam, "Public Interest Programming," 43.

24. Noam, "Public Interest Programming," 42–43. Noam acknowledged that increased competition had led some news magazines to focus on more sensational subjects, particularly among syndicated "tabloid" shows, but found that this "pales in comparison" to the growth of serious news magazine programs on the networks.

25. The study measured broadcast time (discounted for commercials) devoted to newscasts, informational programs (exclusive of tabloid and talk shows), public affairs, and educational and religious programs in various markets during selected weeks in the period from November 1997 through January 1998. The total amount of such "public interest" programming in the seventeen markets was: Dallas-Ft. Worth (32 percent); Houston (26 percent); Seattle-Tacoma (27.1 percent); Sacramento (25.2 percent); St. Louis (25.8 percent); Portland, Ore. (26.4 percent); Charlotte, N.C. (27.7 percent); San Antonio (22.4 percent); Hampton-Norfolk, Va. (25.7 percent); New Orleans (26.4 percent); Santa Fe-Albuquerque (23.4 percent); Louisville, Ky. (23.6 percent); Boise, Idaho (24.4 percent); Honolulu (19.9 percent); Spokane (24.1 percent); Tucson (22.6 percent); and Tulsa (24.9 percent). When commercial time during public interest programming is counted as well, the total amount of time devoted to such programming increases by approximately 24 percent. See A. H. Belo Corp., *Non-Entertainment Programming Study* (1998).

26. See NAB, *Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service*, April 1998.

27. *Children's Television Order*, 10677, 10679. Proponents of the rules often asserted that the amounts of programming devoted to education were inflated by outlandish claims regarding the instructional value of such programming as *The Flintstones* or *The Jetsons*. Such anecdotes were frequently repeated but never quantified. Moreover, broadcasters might be forgiven for some confusion in implementing the new requirements because Congress, in the legislative history of the *Children's Television Act*, listed shows such as *The Smurfs* and *Pee Wee's Playhouse* as programming that met the law's broad criteria for educational and informational programs. See *Children's Television Act of 1989*, S. Rep. No. 227, 101st Cong., 1st Sess. 7–8 (1989).

28. *Children's Television Order*, 10678.

29. *Children's Television Order*, 10676.

30. See *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976).

31. *Chisholm v. FCC*; also see Henry Geller, 95 F.C.C.2d 1236 (1983), aff'd sub nom. *League of Women Voters v. FCC*, 731 F.2d 995 (D.C. Cir. 1984).

32. *In re Requests of Fox Broad. Co., Pub. Broad. Serv., & Capital Cities/ABC, Inc.*, 11 FCC Rcd. 11, 101 (1996).

33. *Arkansas Educational Television Commission v. Forbes*, 118 S.Ct. 1633, 1643 (1998). (Such a result "does not promote speech but represses it.")

34. Thomas W. Hazlett, "Market Failure as a Justification to Regulate Broadcast Communications," in *Rationales and Rationalizations*, ed. by Robert Corn-Revere (Washington, D.C., Media Institute, 1997), 165. See also Thomas W. Hazlett and David W. Sosa, "Was the Fairness Doctrine a 'Chilling Effect'? Evidence from the Postregulation Radio Market," *Journal of Legal Studies* 26 (January 1997): 307.

35. Hazlett, "Market Failure as a Justification," 165.

36. Cass Sunstein, "The First Amendment in Cyberspace," *Yale Law Journal* 104 (May 1995): 1757, 1785–1786.

37. Claudia Puig, "FCC Chief Wants Talk Radio Shows to Deal in 'True Facts,'" Gannett News Service, 25 Sept. 1994 (radio wire).

38. Reed Hundt, "Not So Fast," speech by the FCC chairman at the Museum of Television and Radio, New York City, 3 June 1997.

39. James H. Quello, "'Reeding' the First Amendment—A Disagreement," remarks by the commissioner before the Florida Association of Broadcasters, 26 June 1997. ("I see the Bill of Rights as a limitation upon government action; the Chairman sees it as a regulatory mission statement.") Such regulatory questions were explored in detail by the Commission when it decided to eliminate the fairness doctrine. See *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

40. See Robert Post, "Equality and Autonomy in First Amendment Jurisprudence," *Michigan Law Review* 95 (1997): 1517, 1538. ("To cast the state as teacher is to permit the state to define the agenda and parameters of public debate; it is to presuppose an Archimedean point that stands outside of the processes of self-determination.") Despite its inability to pinpoint how much educational programming existed in the marketplace, the FCC's rules were premised on the assumption that there is "an underprovision of children's educational and informational television programming." *Children's Television Order*, 11 FCC Rcd., para. 34.

41. Thomas G. Krattenmaker and L. A. Powe, Jr., "Converging First Amendment Principles for Converging Communications Media," *Yale Law Journal* 104 (May 1995): 1719, 1725–1726.

42. Sunstein, "The First Amendment in Cyberspace," 1788. See also Owen Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder: Westview Press, 1996), 21. ("[T]he approach I am advocating is not concerned with the speaker's autonomy, real or effective, but with the quality of public debate.")

43. Sunstein, "The First Amendment in Cyberspace," 1788. Sunstein has written that "[p]references that have adapted to an objectionable system cannot justify that system." Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993), 221.

44. Sunstein, "The First Amendment in Cyberspace," 1790.

45. Sunstein, *The Partial Constitution*, 221.

46. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) *("Barnette")*.

47. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y.), aff'd, 326 U.S. 1 (1943).

48. *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 738 (1970).

49. *Barnette*, 638.

50. See, e.g., Fiss, *Liberalism Divided*, 40. ("To be a consumer, even a sovereign one, is not to be a citizen.").

51. Sunstein, "The First Amendment in Cyberspace," 1790.

52. Sunstein, "The First Amendment in Cyberspace," 1787–1792.

53. Fiss. *Liberalism Divided*, 30. This statement directly confronts the Supreme Court's admonition in *Buckley v. Valeo*, 424 U.S. 1, 49 (1976), that such preferential treatment is "wholly foreign" to the First Amendment.

54. Sunstein, "The First Amendment in Cyberspace," 1780. ("[S]peech should not be treated as a simple commodity, especially in a period dominated by attention to sensationalistic scandals and low-quality fare.")

55. Max Lerner, "Some Reflections on The First Amendment in the Age of Paratroopers," *Texas Law Review* 68 (1990): 1127, 1134–35.

56. Alexander Meiklejohn, "The First Amendment is an Absolute," 1961 *Sup. Ct. Rev.* 245, 262.

57. Meiklejohn, "The First Amendment is an Absolute."

58. Sunstein, "The First Amendment in Cyberspace," 1780, n. 98. ("Perhaps those interested in Madisonian goals should focus on the entirety of the free speech market, seeing magazines, broadcasting, and even books as aspects of a single market, to be taken as a whole.")

59. Meiklejohn, "The First Amendment is an Absolute," 262.

60. *Barnette*, 637. See Post, "Equality and Autonomy in First Amendment Jurisprudence," 1540. (Such an approach "necessarily puts the state in the position of dictating to the people the outcome of their public deliberations.")

61. Sunstein, "The First Amendment in Cyberspace," 1786. See also 1788. ("A democratic citizenry armed with a constitutional guarantee of free speech need not see consumer sovereignty as its fundamental aspiration.")

62. Krattenmaker and Powe, "Converging First Amendment Principles," 1732. See Post, "Equality and Autonomy in First Amendment Jurisprudence," 1539. ("Certainly it is compatible with the free speech tradition for the state to act positively to subsidize and thereby to supplement and improve public discourse.") See also Rodney A. Smolla, "The Culture of Regulation," *CommLaw Conspectus* 5 (Summer 1997), 193, 202. Other theorists have suggested that the government could "subsidize those broadcasters whose programming it prefers, even if any such preference embodies content discrimination" (Sunstein, "The First Amendment in Cyberspace," 1798). See also Fiss, *Liberalism Divided*, 103. (Government must set the agenda for public discourse by making decisions "analogous to the judgments made by the great teachers of the universities of this nation.")

63. See generally, "The Future of Public Broadcasting," *Comint* 3 (Fall 1992), 1–32; Charles S. Clark, "Public Broadcasting," *The CQ Researcher*, 18 Sept. 1992, 812–814, 820–824.

64. Charles S. Clark, "Public Broadcasting," 822.

65. Charles S. Clark, "Public Broadcasting," 820.

66. Erwin G. Krasnow, Lawrence D. Longley, and Herbert A. Terry, *The Politics of Broadcast Regulation* 3d ed. (1982), 71.

67. Lucas A. Powe, Jr., *American Broadcasting and the First Amendment* (1987), 129. The concern ultimately led to President Nixon's veto of the public broadcasting authorization bill in June 1972. Buchanan, by all accounts, was characteristically blunt about the administration's intent. He reportedly told a public broadcasting executive at a cocktail party, "If you don't do the kind of programming we want, you won't get a fucking dime."

68. E.g., *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984); and *Community-Service Broadcasting of Mid-America v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc). See also *Accuracy in Media v. FCC*, 521 F.2d 288, 291 (D.C. Cir. 1975) cert. denied, 425 U.S. 934 (1976). Compare to *Turner Broadcasting System v. FCC*, 114 S.Ct. at 2464, in which the government is foreclosed from using its financial support to gain leverage over any programming decisions. But see *Finley v. National Endowment for the Arts*, 118 S.Ct. 2168 (1998), which found that the government may require some additional non-dispositive criteria for issuing competitive grants for art.

- The law also would empower (but not require) the FCC to exempt sporting events from the ban on violent programming. But the socially-sanctioned violence of professional sports conceivably could be a source of the most widespread social effects of all. Children emulate sports stars, and in 1997 there were 14 deaths among high school and middle school football players, and 18 such fatalities in 1996. In addition, in 1996 there were over 360,000 football-related injuries among persons under 25, according to the National Safety Council. Other commentators have pointed out that Super Bowl Sunday may be one of the busiest days of the year at battered women shelters.

- In sum, the programming preferences that would be enshrined in law may have little or nothing to do with the social effects the policy was designed to address.

Testimony of Robert Corn-Revere
Before the Subcommittee on Communications
Senate Committee on Commerce, Science, and Transportation
May 18, 1999

Thank you for inviting me to testify about the issue of televised violence and legislative proposals such as S. 876, the "Children's Protection from Violent Programming Act."[1] I hope that this hearing will be part of a continuing dialogue that will lead to more open discussion of mass media, culture and public policy. It is only through such discussion and debate, rather than through a decision to affirm conclusions already reached, that the most effective policies will emerge. My comments will focus primarily on some of the constitutional ramifications of S. 876.

Although recent events have intensified the focus on media violence, the issue has preoccupied policymakers for much of the 20th Century whether the issue involves cinema, crime novels, comic books or television.[2] In the Telecommunications Act of 1996, Congress addressed concerns about televised violence by adoption of Section 551, which requires the installation of V-chips in new television sets. In 1998, the Federal Communications Commission approved both technical standards for the V-chip, and an industry-created ratings system to be used with the device. The thrust of S. 876, however, is that "technology-based solutions" are not yet universally available and are not sufficient to deal with the issues raised by televised violence.

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[1] The views I am expressing today are my personal views and should not be attributed to any other parties.

[2] *See Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C.2d 418 (1975). The Federal Communications Commission's 1975 report to Congress on violent programming concluded that industry self-regulation should be emphasized over legislation because of First Amendment concerns and the subjective nature of what type of violence is inappropriate. *Id.* at 419-420. The FCC's behind-the-scenes activities in preparation of the report led to adoption by the networks of the "family viewing policy." However, the extent to which the policy was an exercise in "self-regulation" was questioned by the reviewing court and the policy was invalidated. *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated and remanded on jurisdictional grounds sub nom. Writers Guild of America, West v. ABC*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

Instead of individual viewer empowerment, S. 876 proposes direct regulation of broadcast and cable television programming. Specifically, it would prohibit the distribution to the public of any "violent video programming" during hours when children are reasonably likely to comprise a substantial portion of the audience, and would require the FCC to establish the "safe harbor" hours during which such programming could legally by shown. Assuming the Commission adopted the same time channeling approach that it now uses to restrict broadcast indecency, this would lead to a ban on violent programming between 6 a.m. and 10 p.m. -- two-thirds of the broadcast day. It would impose this restriction on every television home in the United States even though two-thirds of all households in the United States do not have minors residing in them, according to the U.S. Bureau of the Census.[3]

In short, S. 876 proposes a sweeping restriction on programming. The obvious question that must be addressed is whether such a restriction is consistent with relevant judicial precedents. Some have suggested that the government's constitutional authority to regulate violent speech is indistinguishable from its authority to regulate broadcast indecency under *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*"), or the ability of cable operators to reject indecent leased access programming pursuant to *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996) ("*Denver*"). Such assumptions are unwarranted.

The available case law from a variety of contexts, however, does not support the equivalent treatment of "indecent" and "violent" programming. For its part, the Supreme Court has emphasized the "narrowness" of the *Pacifica* holding on indecency.[4] To add violence to the types of content that could be more intensively regulated would be a significant expansion of the government's ability to control speech. In general, courts have been unwilling to approve the government's authority to regulate violent expression differently from other protected speech. For example, in *Winters v. New York*, the Supreme Court invalidated a state law that curbed the publication of magazines "devoted principally to criminal news and stories of bloodshed, lust or crime." In doing so, the Court pointedly stated: "What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the

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[3] STATISTICAL ABSTRACT OF THE UNITED STATES 1995, Dept. of Commerce, Econ. & Stats. Admin., Bur. of the Census (115 ed. Sept. 1995).

[4] *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 63, 74 (1983); *See Pacifica*, 438 U.S. at 750.

protection of free speech as the best of literature."[5] Similarly the Seventh Circuit has noted that "violence on television . . . is protected speech, however insidious. Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us."[6] In another case invalidating restrictions on videotape rentals to minors, the U.S. Court of Appeals for the Eighth Circuit has held that violent video programming is entitled to "the highest degree of First Amendment protection." [7] Similarly, various courts have rejected tort claims based on violent programming and at least one court expressly declined an invitation to extend *Pacifica* to this area.[8]

Chief Judge Harry Edwards of the United States Court of Appeals for the D.C. Circuit, in an influential law review article, identified many of the serious constitutional questions that would have to be addressed with respect to any regulation of televised violence.[9] Judge Edwards concluded that there must be full First Amendment protection for violent speech.[10] He noted that the constitutional weakness of any scheme to regulate violence turns on the definition that the law uses. Judge Edwards and his co-author concluded that "[w]hen it comes to televised violence, we cannot imagine how regulators can distinguish between harmless and harmful violent speech, and we can find no proposal that overcomes the lack of supporting data."[11] They added: "We cannot imagine how a regulator might fix

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5 333 U.S. at 510-11.

6 *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

7 *Video Software Dealer's Association v. Webster*, 968 F.2d 684 (8th Cir. 1992).

8 *See, e.g., Olivia N. v. National Broadcasting Co.*, 126 Ca. App. 3d 488, 178 Cal. Rptr. 888, 894 (Cal. App. 1st Dist. 1981) (rejecting relevance of *Pacifica* outside the context of "indecent" programming); *Zamora v. Columbia Broadcasting System*, 480 F.Supp 199 (S.D. Fla. 1979).

9 *See* Harry T. Edwards and Mitchell N. Berman, *Regulating Violence on Television*, 89 NORTHWESTERN U. L. REV. 1487 (1995). *See also* Patricia M. Wald, *Doing Right by Our Kids: A Case Study in the Perils of Making Policy on Television Violence*, 23 U. BALT. L. REV. 397 (Spring 1994).

10 Edwards and Berman, *supra* note 9 at 1524.

11 *Id.* at 1565.

rules designed to ferret out gratuitous violence without running the risk of wholesale censorship of television programming."[12]

Various courts have borne out Judge Edwards' concern about the ability to fashion a constitutionally defensible definition of "violence." In striking down the Missouri law that prohibited rental of violent video tapes to minors, the United States Court of Appeals for the Eighth Circuit found it "virtually impossible" to determine if the law could be narrowly applied so as to survive constitutional review.[13] Similarly, in other contexts, courts have invalidated restrictions on providing materials depicting "excess violence" to minors on the ground that the laws were unconstitutionally vague. Indeed, the Supreme Court of Tennessee described such a statutory restriction as "entirely subjective."[14] That court also noted that "every court that has considered the issue has invalidated attempts to regulate materials solely based on violent content, regardless of whether that material is called violence, excess violence, or included within the definition of obscenity."[15]

Similarly, Supreme Court precedent does not support the expansion of the *Pacifica* approach to cable television networks. The case most often cited to justify such expanded governmental authority, *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), is far from helpful. In that case, the Court struck down two restrictions on indecent programming on cable leased access channels, while upholding one provision of the law. The rule upheld in *Denver* -- Section 10(a) of the 1992 Cable Act -- merely permitted cable operators to reject indecent programming on leased access channels. Unlike S. 876, Section 10(a) imposed no requirement at all on cable operators to restrict programming.[16]

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12 *Id.* at 1502 (emphasis in original).

13 *Video Software Dealer's Association,* 968 F.2d at 689.

14 *See Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 532. *See also Allied Artists Pictures Corp. v. Alford*, 410 F. Supp. 1348 (W.D. Tenn. 1976).

15 *Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 531.

16 *Denver*, 518 U.S. at 750 (Court approved only permissive controls on indecent leased access programming) (plurality op.); *id.* at 768 (Stevens, J., concurring) ("The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition."); *id.* at 779 (O'Connor, J., concurring in part and dissenting in part) (Sections 10(a) and 10(c) leave to the cable operator the decision whether or not to broadcast indecent programming.); *id.* at 823 (Thomas, J., concurring in part and dissenting in part) ("The permissive nature of §§ 10(a) and (c) is important in this

In practical terms, *Denver* approved cable operators' ability to transmit (or not) totally unscrambled indecent programming on leased or public access channels at any time of the day or night. 518 U.S. at 752 (plurality op.). Thus, Section 10(a) expanded cable operators' editorial control over leased access channels because it empowered them for the first time to accept or reject indecent programs on those channels.[17] Moreover, unlike the governmental mandate that would be imposed by S. 876, there is no possibility that the voluntary rules approved in *Denver* would be vague or overly broad, since cable operators themselves were given the authority to define what programming is "indecent."

The difficult constitutional issues presented here also are highlighted by a 1996 decision of the United States Court of Appeals for the District of Columbia Circuit involving the FCC's political broadcasting rules. Although the case did not raise First Amendment issues, it addressed the problem of censorship when safe harbor restrictions are expanded beyond the confines of broadcast "indecency." That case involved an FCC declaratory ruling that permitted broadcasters to channel political advertisements that contained graphic imagery that, in the good faith judgment of the licensees, posed a risk to children.[18] The Commission had found that the presentation of graphic abortion imagery in political advertisements "can be psychologically damaging to children" and ruled that broadcasters had discretion to transmit such materials at times when children were less likely to be in the audience. The FCC concluded that such a decision would be reasonable, so long as it was not based on the candidate's political viewpoint and only to the extent the candidate was allowed access at times when "the audience potential is broad enough to meet . . . reasonable access obligations."[19] One United States District Court similarly found that graphic anti-abortion images

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regard. If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmer's right . . . to compete for space on an operator's system.") (citation omitted).

17 *Denver*, 518 U.S. at 743 (plurality op.) (provision involves a complex balance of First Amendment interests).

18 *Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act*, 9 FCC Rcd. 7638 (1994).

19 *Id.*

posed the risk of a negative psychological impact on children, and held that such political advertisements were indecent.[20]

Notwithstanding these findings, the U.S. Court of Appeals for the District of Columbia Circuit held in *Becker v. FCC* that the imperative needs of the young did not outweigh the marginal needs of some candidates. The court concluded that channeling political advertisements violated the "no censorship" provision of Section 315 of the Communications Act. In sharp contrast to the conclusion in the broadcast indecency cases, the court in *Becker* found that "censorship, . . . as commonly understood, connotes any examination of thought or expression in order to prevent discussion of 'objectionable' material."[21] It concluded that restricting programming to the safe harbor hours amounted to being sent to "broadcasting Siberia."[22] It also found that the ability to channel speech would give broadcasters too much power to discriminate between candidates which would exert a chilling effect on speech.[23]

The same concerns apply to any measure that would give the government the authority to discriminate between various types of violent programming. This is a particularly pressing concern with measures such as S. 876, since social science research suggests that some portrayals of violence are pro-

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20 *Gillett Communications of Atlanta, Inc. v. Becker*, 807 F. Supp. 757, 763 (N.D. Ga. 1992), *appeal dismissed*, 5 F.3d 1500 (11th Cir. 1995).

21 *Becker v. FCC*, 95 F.3d 75, 82 (D.C. Cir. 1996), quoting *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 527 (1959).

22 *Becker*, 95 F.3d at 80, 84.

23 *Id.* at 83 ("Not only does the power to channel confer on a licensee the power to discriminate between candidates, it can force one of them to back away from what he considers to be the most effective way of presenting his position on a controversial issue lest he be deprived of the audience he is most anxious to reach."). Although the Commission stressed that it intended to permit licensees no discretion to channel political advertisements on the basis of a candidate's political position, but only as a response to graphic imagery, *Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act*, 9 FCC Rcd. at 7647-48, the court found that "[i]n many instances . . . it will be impossible to separate the message from the image." *Becker*, 95 F.3d at 81. This statement is difficult to reconcile with the Supreme Court's assurance with respect to "indecent" speech that "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Pacifica*, 438 U.S. at 743 n.18.

social, while others are not. But separating "good" violence from "bad" violence is a highly subjective judgment that cannot be accomplished realistically by imposing "safe harbor" rules. The 1997 UCLA Television Violence Report, for example, noted that if all violence were eliminated, "viewers might never see a historical drama like *Roots*, or such outstanding theatrical films as *Beauty and the Beast*, *The Lion King*, *Forrest Gump* and *Schindler's List*." The National Television Violence Study similarly reported that "not all portrayals of violence are the same." Both reports list myriad factors to explain a preference for some violent programs over others, but to incorporate these theoretical choices into public policy would require micromanagement of program production and would be utterly unworkable. As Judge Edwards warned, the factors involved -- "whether violence is presented as justified, effective, unpunished, socially acceptable, gratuitous, realistic (yet fictional), humorous, and motivated by a specific intent to harm" -- create a seemingly "insurmountable obstacle" that the government could "actualize the requisite subtlety into legislation."[24]

It is not necessary to attempt to analyze the complexity of the various factors as they relate to dramatic programming that contains violence. It is sufficient to note that it would be all but impossible to draft a law that would effectively distinguish between *NYPD Blue* and *Walker, Texas Ranger* that would permit one program to be aired and require the other to be banned. The alternative would simply to ban all portrayals of violence, a solution that would destroy the village in order to save it. But it is worth noting that S. 876 attempts to distinguish between pro-social and unacceptable violence on television on a more basic level. It would empower the FCC to exempt from its ban on violent programming those shows that it determines do "not conflict with the objective of protecting children from the negative influences of violent video programming," including "news programs and sporting events."

Such proposed exceptions to the violence "safe harbor" in S. 876 help illustrate the subjectivity of the choices that would be made. The law would empower (but not require) the FCC to exempt news programs from the ban on violent programming. Restricting news coverage, whether it involves local crime, the use of napalm on Vietnam villages or bombing raids in Kosovo, goes to the heart of First Amendment protections. Yet at the same time, at least one researcher from the National Television Violence Study announced research findings that news programs can cause "elevated fears among children" and advocated extending V-

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[24] Edwards and Berman, *supra* note 9, at 1554.

chip requirements to cover news broadcasts. Other advocates of a violence safe harbor have suggested that violent news coverage should be subject to regulation.[25]

Similarly, the law also would empower the FCC to exempt sporting events from the ban on violent programming. But the socially-sanctioned violence of professional sports conceivably could be a source of the most widespread social effects of all. Children emulate sports stars, and in 1997 there were 14 deaths among high school and middle school football players, and 18 such fatalities in 1996. In addition, in 1996 there were over 360,000 football-related injuries among persons under 25, according to the National Safety Council.[26] Other commentators have pointed out that Super Bowl Sunday may be one of the busiest days of the year at battered women shelters.[27] One writer for the DAILY LONDON TELEGRAPH, citing research from New Zealand that youths who engage in sports are more likely to become delinquent, simply suggested banning sports.[28] The suggestion was no doubt tongue-in-cheek, but it underscores a serious question: Which programming is most closely associated with the suggested harms, and can the distinction be addressed realistically by the law?

It is extremely doubtful that these questions can be answered in a way that would survive constitutional review.

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[25] *E.g.*, James T. Hamilton, CHANNELING VIOLENCE 239-284 (1998).

[26] National Safety Council, *Accident Facts* (1998).

[27] Anna Quindlen, *Time to Tackle This*, N.Y. TIMES, Jan. 17, 1993 at A17. **[Note: after presenting this testimony in 1999, I have learned that this claim about Super Bowl Sunday is an urban myth. *See* The San Fernando Valley Folklore Society Urban Legends Reference Page (http://www.snopes.com/).]**

[28] Theodore Dalrymple, *Is it Time We Banned All Sports?* DAILY LONDON TELEGRAPH, DECEMBER 13, 1996.